STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SBC Communications Inc.,	)	
SBC Delaware Inc.,	)	
Ameritech Corporation,	)	
Illinois Bell Telephone Company d/b/a Ameritech	)	
Illinois, and Ameritech Illinois Metro, Inc.	)	
	)	
	)	ICC Docket No. 98-0555
Joint Application for Approval of the	)	
Reorganization of Illinois Bell Telephone Company	)	
d/b/a Ameritech Illinois, and the Reorganization of	)	
Ameritech Illinois Metro, Inc. in Accordance with	)	
Section 7-204 of the Public Utilities Act and for All	)	
Other Appropriate Relief	)	

AT&T BRIEF ON REOPENING

AT&T Communications of Illinois, Inc. ("AT&T"), by its attorneys, hereby submits its brief on reopening, pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission") Rules of Practice.

INTRODUCTION

The Commission on Reopening has given the Joint Applicants an opportunity to repair a flawed case. As AT&T and other Intervenors showed in their briefs following the initial proceedings, the record in this proceedings is wholly inadequate to support approval of this merger under the Public Utilities Act. As to the question of the effect of the merger on competition, an issue with which this Commission has been intensely concerned for many years and the issue upon which AT&T focused in its testimony, Joint Applicants began with a daunting challenge: How can a merger that combines two large local monopolies into a giant regional monopoly covering some 40% of the country's access

lines be portrayed as anything other than a crippling blow to all efforts to open local exchange markets to competition? And indeed they never overcame that challenge. Over the course of the case in chief, Joint Applicants abandoned their fanciful "retaliatory entry" theory and instead retreated to a fall-back position, claiming that the merger would not make matters worse from a competitive standpoint.

The facts and arguments as to why that is not the case were set forth in AT&T's post-hearing briefs and those of other Intervenors, and will not be reiterated here. Suffice it to say that a majority of the Commission obviously was not persuaded. Consequently, the Commission in the Chairman's June 4th letter pointed out that the Public Utilities Act requires the ICC to reach determinations regarding such issues as "the proposed reorganization's *effects upon competition* . . .and possible *conditions* to the merger." It stated the Commission's intention was "to have the parties create a focused, detail-oriented process which exacts definite information and possible conditions which would ameliorate . . . concerns regarding the local exchange market in Illinois. This process must lead to specific conclusions, timetables and *enforcement mechanisms* that allow the Commissioners to reach a well-reasoned conclusion in this matter."

The Joint Applicants in response have provided many words and pages of discussion, but their submission is woefully lacking in substance. The issues posed for reopening are discussed individually below, but what emerges, first of all, is that their testimony contains absolutely nothing new on the core issue of competition. With respect to the question of potential competition, for example, Joint Applicants have merely

repeated what they have said before. They even admit as much.[1] Thus, absent definitive, enforceable commitments and measures adequate to blunt the anticompetitive impact of the merger, it must fail the statutory test.

As to commitments,[2] as discussed below Joint Applicants present a series of vague promises. Many of these promises amount to nothing more than a vow to start a regulatory process; e.g., the promise to "present" certain performance measurements from the Texas proceeding to an Illinois collaborative. More cynically, Joint Applicants also promise to stop violating the law; e.g., by offering a form of shared transport. Another recurrent promise is the agreement to do what they are already required to do; e.g., negotiate and arbitrate interconnection arrangements with CLECs. Moreover, these promises are so heavily caveatted that they are rendered useless. Not only are the promises hollow -- e.g., to offer shared transport without pricing and in advance of specifications for ordering it electronically as part of a UNE Platform -- they are infused with equivocation if not obfuscation and laced with caveats. The efforts of the Commission to gain specificity on reopening, in short, have been for naught.

Similarly, with respect to enforcement mechanisms, instead of specific, concrete, liquidated damages-type enforcement mechanisms, Joint Applicants propose in nearly every instance that CLECs go through arbitration or a complaint procedure to achieve

---

[1] Tr. at 1848 (Kahan Cross).

[2] At this point we address the "commitments" that Joint Applicants presented on reopening and on which they expressly rely for purposes of the Commission's decision in this case. The Proposed FCC Conditions present distinct issues. The Joint Applicants maintain that they are not relying on the Proposed FCC Conditions in this case, but they submitted them in the rebuttal round on reopening and they occupied much of the hearings. The problems created by Joint Applicants' handling of the Proposed FCC Conditions are discussed below.

compliance. In other words, they invite enforcement through more litigation. Again, that is non-responsive to the Commission's invitation.

In short, Joint Applicants have failed to meet their burden again. Joint Applicants' Amended Application is little more than a rehash of their previous evidence and arguments. Their "commitments" are illusory. They are unenforceable platitudes. And, even if one accepts their commitments at face value, without scrutiny, the commitments fail completely to remedy the fundamental competitive problems associated with combining these two monopolies.

* * *

It is apparent from the questions on Re-Opening that the Commission is engaged in an effort to salvage this merger through the adoption of conditions adequate, inter alia, to ameliorate its anticompetitive impact. That is a laudable goal. AT&T has expressed skepticism – based on the track records of Ameritech as well as SBC, and based on the lessons of the Bell Atlantic/NYNEX merger – that conditions are capable of effectively neutralizing the competitive harms of this merger. It might, however, be possible to structure a combination of enforceable promises back by stiff penalties, along with demonstrated progress, that would suffice. That would be a very different undertaking from what the Commission has before it, however. The set of conditions and the underlying premises espoused by Joint Applicants are so profoundly lacking that no amount of amendment or "redlining" cam make them work, and the accelerated schedule on re-opening (e.g., allowing less than three weeks for Intervenors to file their direct testimony on re-opening) simply has not allowed for the needed wholesale fresh start on these issues.

Consequently, AT&T has not, regrettably, been in a position to do much more than point out the shortcomings of Joint Applicants' proposals on re-opening. If the Commission wishes to pursue a serious effort to structure conditions to allow approval of the merger – particularly conditions relating to competitive issues – a further round of proceedings with that express purpose would be needed. That would require rejection of this application and a subsequent filing and set of hearings, to which Joint Applicants would not doubt object, but again the need to re-start the process is attributable squarely to Joint Applicants and their strategic maneuverings in this docket.

ARGUMENT

I. The Record on Reopening Is, As a Result of Joint Applicants' Handling of the Proposed FCC Conditions, Hopelessly Confused and Deficient and Cannot Properly Support an Order Approving This Merger with Conditions.

The manner in which Joint Applicants have treated the Proposed FCC Conditions is improper if not outright misleading and, ultimately, it undermines the Commission's record in this case.[3] The Proposed FCC Conditions were made public on Friday, July 2, just before the July 4th holiday weekend. It was immediately obvious upon review of the FCC proposals that they were different from, but overlapped in many areas with, proposals the Joint Applicants have put forward in this case. Moreover, it was and is

[3] The issue-by-issue discussion that follows in Section II nevertheless addresses certain aspects of the Proposed FCC Conditions and their relationship with the Illinois proposed conditions, given that they were admitted into the record over the objections of AT&T and other Intervenors.

obvious that the Proposed FCC Conditions, if adopted by the FCC,[4] would have a negative impact on the Commission's market-opening efforts *in Illinois*.

Consequently, a number of Intervenors moved to require Joint Applicants to put those proposed FCC conditions in the record here and to have Joint Applicants explain the relationship between those undertakings and the Illinois proposed conditions.[5] Intervenors would then have been given an opportunity to conduct discovery and present testimony in response to the Joint Applicants[6] (and Joint Applicants could then have responded in *their* rebuttal round). Joint Applicants *opposed* the motion, and it was subsequently denied, i.e., Joint Applicants were not required to submit the Proposed FCC Conditions on this record and allow for discovery and testimony in response.[7] Intervenors' testimony on reopening was therefore limited to the Illinois record and did not address the FCC Proposed Conditions.[8] Subsequently, Joint Applicants included the Proposed FCC

---

[4] The Proposed FCC Conditions reportedly reflect a tentative agreement between the Joint Applicants and Staff of the FCC. As subsequent press releases from individual FCC Commissioners have made clear, however, the Commissioners themselves have not been involved in discussions with the companies and the proposed conditions do not reflect any agreement or even familiarity on their part. Comments on the proposed conditions were filed with the FCC on Monday, July 19, and reply comments on July 26. Attachment A to this brief is a copy of AT&T's Comments for the Commission's information. (An appendix to those comments containing a "condition-by-condition" analysis is available but has not been included due to its length.).

[5] Joint Motion for Emergency Status Hearing and to Amend Procedural Schedule (July 2, 1999).

[6] As of the filing of the July 2 Emergency Joint Motion, Intervenors had not yet filed their direct testimony on reopening.

[7] Joint Applicants were ordered to file their Proposed FCC Conditions in the Indiana Utility Regulatory Commission merger review proceeding and Intervenors were permitted to file testimony addressing the FCC proposals.

[8] Remarks from the bench in connection with the motion conveyed a desire on the part of at least some commissioners to have full cross-examination on the FCC conditions at the hearings on reopening.

Conditions in their *rebuttal* filing so that – as predicted in the Emergency Motion – Intervenors had no testimonial opportunity to respond.

The result is, with all due respect, untenable from a record standpoint. First, Intervenors have not had an adequate opportunity, consistent with procedural due process, to "confront" the Proposed FCC Conditions, to conduct discovery in an effort to understand them and their relationship to the Illinois proposed conditions, and to present testimony to the Commission.[9] Notwithstanding Joint Applicants' denial that they were relying on the Proposed FCC Conditions for purposes of this record, as the subsequent hearings have shown it is not possible to separate their undertakings in Illinois from their FCC proposals. Without the FCC proposals and an explanation of them in the record, and a meaningful opportunity to conduct discovery, Intervenors' direct testimony in this case was precluded from addressing the Proposed FCC Conditions in due fashion.

A review of the full chronology by which the Proposed FCC Conditions came about and came to be inserted into this record is telling:

- February 23, 1999 -- The Ohio Stipulation, which ultimately will serve as the basis for the Proposed FCC Commitments, is filed. Only the Ohio Staff and three other parties (no CLECs) affirmatively support the Stipulation.

- February – April, 1999 Joint Applicants file their Initial, Reply, Exceptions and Replies to Exceptions Briefs in Illinois. No mention is made of any substantial conditions on competition issues, such as OSS, performance measurements, etc.

[9] Section 200.340 of the Commission's Rules of Practice states that it is the "policy of this Commission to obtain full disclosure of all relevant and material facts." The Illinois Administrative Procedure Act provides that all parties shall be afforded an opportunity "to respond and present evidence and argument." 5 ILCS 100/10-20.

- April 30 and June 21, 1999 -- Joint Applicants tell the Commission they cannot discuss FCC negotiations because those are confidential (even though the Ohio Stipulation is public).[10]

- June 7, 1999 -- When the Commission indicates that it needs more evidence, Joint Applicants initially refuse the opportunity to reopen the record, instead filing a non-evidentiary letter.

- June 15, 1999 -- Joint Applicants finally file commitments in Illinois, which later turn out to be materially different from the Proposed FCC Conditions.

- July 2, 1999 -- The Proposed FCC Commitments are made public – one business day before Intervenors file their testimony on reopening in Illinois.

- July 6, 1999 -- Joint Applicants oppose Intervenors' Joint Motion, which requests filing of the FCC commitments in Illinois and a brief opportunity to conduct discovery and respond. Joint Applicants state: "Whatever parallel or supplemental conditions may be proposed to and adopted by the FCC will not impact these [Illinois] commitments."[11]
- July 8, 1999 – the Joint Motion is denied. Instead of filing the Proposed FCC Conditions, Joint Applicants are directed to make witnesses available for *cross-examination* on the FCC proposals.

- July 9, 1999 -- Joint Applicants *file* the FCC commitments in Illinois, despite their previous opposition to the Joint Motion and despite the Commission's ruling. The FCC commitments, which are over 100 single-spaced pages, are filed at 5:00 p.m. on the Friday before a Tuesday hearing.

In short, Joint Applicants have succeeded in "sandbagging" Intervenors and the Commission with the proposed FCC conditions.

The problem is not limited to the shortcomings, from a procedural due process standpoint, in the manner in which the Proposed FCC Conditions have been injected into this record. An even greater problem, as became manifest at the hearings, is that it is unclear in many respects just how the FCC and Illinois-proposed conditions are

[10] Tr. at 491-94 (Apr. 30, 1999 Oral Argument); Tr. at 1823 (June 21, 1999 Status Hearing).
[11] SBC/Ameritech Opp. to Joint Mot. for Emergency Status Hearing and to Change Procedural Schedule ¶ 3 (July 6, 1999).

interrelated and just what are the contours of Joint Applicants' undertakings in Illinois. On this record, in other words, the Commission does not and cannot know exactly what conditions and commitments it is dealing with.

At the hearings, counsel for the Intervenors attempted through cross-examination to explore how the Proposed FCC Conditions would apply and how they affect the scope of Joint Applicants' Illinois undertakings. That effort revealed that Joint Applicants at best have not thought through these issues; at worst, they are attempting a regulatory "sleight of hand" designed to conceal the true scope of their commitments and to mislead the Commission and the parties.

To take one example, but an important one, Joint Applicants in their *Illinois* testimony make much of their commitment to offer shared transport which, in conjunction with their obligation under their interconnection agreements (as well as TA96) to provide UNE "combinations," should result in the UNE Platform being made available.[12] No limitations are attached to that offer in their *Illinois* testimony. At face value, then, the Illinois record holds forth the "commitment" finally to make the platform available in the state. The Proposed FCC Conditions, however, provide for something described ambiguously as a "promotional" UNE Platform. It is to be offered to *residential* customers only, it is subject to a ceiling or cap of 302,000 customers[13] in Illinois, and it is available for a "window" of three years. There is not a word about these limitations – not

---

[12] This Illinois UNE-P offering was confirmed in discovery. AT&T Cross Ex. E.

[13] The cap, moreover, is for the combination of resale and UNE combinations customers, i.e., if 100,000 customers are served via resale, that would leave 202,000 who could be served via the "promotional" UNE-P in Illinois. This cap is to be divvied up among the scores of certificated local exchange carriers in Illinois on a first come, first served basis.

the cap, not the residential limitation and not the offer "window" – in Joint Applicants' Direct, Supplemental Direct or Rebuttal testimony on reopening.

When first asked about whether the federal cap applies to the offering in Illinois, SBC's principal witness stated that it did not:

> Q. --this [Paragraph 49 of the Proposed FCC Conditions] says there's a cap there in Illinois of 302,000 and that cap applies to UNE combinations and the resale discount, correct?
>
> A. That's correct.
>
> Q. And I want to be clear about something. The 302,000, that applies to discounted resale lines, correct?
>
> * * *
>
> [T]here's no cap on the number of resale lines. There's only a cap on the number of resale lines with the discount?
>
> A. Right. I mean, CLECs going to take every customer of ours on a resale basis and that's the way it is.
>
> Q. What about UNE combinations?
>
> A. I think this goes – there's a cap – you're saying is there a cap on UNE combinations?
>
> Q. Yes.
>
> A. There's no cap. I mean, it's the discount. I mean, . . .the discount terminates when you – when the sum of the resale lines plus the UNE-P residential lines hits that number.
>
> * * *
>
> Q. Once you hit 302 [thousand] you can't do UNE combinations anymore, correct?
>
> A. No, I don't believe that's the case.

* * *

> I don't – let me just say I don't believe there is a limit on the number of UNE-P residence lines that a CLEC could attain in Illinois during the three-year period.[14]

In fact, although the above testimony was "subject to verification," Mr. Kahan repeated this testimony the second time he was asked about it.[15] And the third time.[16] It was only on redirect that he corrected the record:

> A. . . . and I apologize to the people that asked questions because what I said was incorrect here. So let me start . . . again here, and it has to do with the question I think I was asked repeatedly and I answered it wrong repeatedly was is there a limit on the number of UNE-Ps that could be sold within this window and I said no, and in truth, there is a limit.
> The limit is a total of – in Illinois of 302. When you reach 302,000 resale discounts plus UNE-Ps within a three-year window, and, and a legal ruling has been made that we don't have to offer UNE-Ps anymore, then the discount on resale stops and the UNE offering stops.[17]

AT&T does not wish to be heard as contending that Mr. Kahan personally intended to mislead or conceal the true nature of Joint Applicants' commitment on this important issue. The point is that the relationship between the Illinois and FCC proposals is *not* self-evident, and even on examination it remains unclear.

Joint Applicants' blithe assertion that Illinois will enjoy "the best of both worlds" simply does not hold up. In fact, it is difficult to determine which "world" is better. In instances where the federal undertaking is more limited or narrow than the state

[14] Tr. at 1906-1910.

[15] Tr. at 1922.

[16] Tr. at 1962-63.

[17] Tr. at 2061-62.

"commitment," there necessarily will be serious question(s) over just what is the scope of Joint Applicants' commitment. For example, the Illinois UNE-P commitment (found in Ameritech's discovery response, AT&T Cross Ex. E) does not contain a cap but the federal commitment does. On the one hand, Joint Applicants have argued that CLECs will get the best of both worlds (no cap), while on the other hand they assert that the "narrower" federal commitment will apply in Illinois (UNE-P cap). Thus, Joint Applicants have set up a situation where they have the ability (and sole discretion) to import the federal limitations and caveats into Illinois. Indeed, Joint Applicants' support of the "best of both worlds" theory under cross-examination was less than reassuring:

> A. I think the way to look at this, you get the best of either. You get A or B. One apple two oranges. Which one do you want?
>
> Q. Who decides which is best?
>
> A. In Illinois or in some other state?
>
> Q. In Illinois.
>
> A. I think the Illinois Commission does.
>
> Q. How do they do that?
>
> A. I don't – ask somebody else.
>
> Q. Through arbitration or docket or investigation?
>
> A. I'm the wrong witness to ask that.[18]

In other respects, the hearings on reopening revealed that Joint Applicants' witnesses were not knowledgeable, or confused, about their own conditions – particularly

---

[18] Tr. at 1871 (Kahan).

the federal proposals. To quote but a few examples of their diverse statements on this score:

- Joint Applicants claim that the FCC and Illinois conditions are "complementary and nothing proposed at the FCC takes away from the benefits" of the Illinois commitments.[19]

- The Proposed FCC Conditions are *not complementary* and by their terms parties must choose either/or: "affected parties shall not have a right to invoke the relevant terms of these [FCC] Conditions in a given state if they have invoked a substantially related condition imposed on the merger under state law."[20]

- Joint Applicants claim that the FCC and Illinois proceedings are "separate and distinct."[21] Mr. Kahan testifies that if the FCC adopts SBC/Ameritech's proposed conditions, the FCC Order will have provisions directly applicable in Illinois.[22]

- Joint Applicants state: "Whatever parallel or supplemental conditions may be proposed to and adopted by the FCC will not impact these [Illinois] commitments."[23]

- In direct contradiction to their July 6 Brief Opposing the Joint Emergency Motion, Joint Applicants now assert that the "FCC conditions will also be effective in Illinois . . ."[24]

- SBC and Ameritech on rebuttal state that they "would not object" if the Commission incorporated Sections 1-6, 8, 9, 11-15, 17-20, and 24 of the FCC Commitments into a Commission Order.[25]

---

[19] Kahan Reopen Reb. (SBC/Ameritech Ex. 1.5) at 26 ("Kahan ROR").

[20] Schedule 1 to Kahan ROR, SBC/Ameritech Ex. 1.5, ¶ 69 ("Proposed FCC Conditions"); Tr. at 1846 (Kahan).

[21] Kahan ROR, SBC/Ameritech Ex. 1.5 at 25.

[22] Tr. at 1903 (Kahan).

[23] SBC/Ameritech Opp. to Joint Mot. for Emergency Status Hearing and to Change Procedural Schedule ¶ 3 (July 6, 1999).

[24] Kahan ROR, SBC/Ameritech Ex. 1.5 at 26.

[25] Kahan ROR, SBC/Ameritech Ex. 1.5 at 5.

- At the same time, SBC and Ameritech state they are not *relying* on the FCC commitments in order to gain approval of the merger in Illinois.[26]

- Nevertheless, SBC's counsel repeatedly questions Intervenor witnesses about the "benefits" of the FCC Commitments.[27]

One can only guess at what position(s) Joint Applicants will take on this issue in their briefs. They obviously have no clear notion of what the effect of the FCC commitments will be in Illinois. Frankly, neither does AT&T. Had SBC and Ameritech not attempted to cut secret deals using inconsistent state and federal "commitments," we might not be facing this dilemma. But for whatever reason, Joint Applicants chose this course. It is not reasonable to expect Intervenors and the Commission to sort out the relationship between the Illinois and the Proposed FCC Conditions when Joint Applicants are unable to do so themselves.[28]

---

[26] Tr. at 1888-89 (Kahan).

[27] Tr. at 2654-56, 2746, 2755-56, 2828-2833.

[28] As another example of possible conflict, the FCC conditions concerning the "separateness" of Joint Applicants advanced services affiliate are not consistent with this Commission's order in ICC Docket No. 94-0308, by which the Commission conditionally certified ADDS, Ameritech's advanced services affiliate. Pursuant to a stipulation and recommendation adopted by the Commission in that case, among other things, ADDS: (1) May not purchase services, whether by tariff or otherwise, from Ameritech Illinois unless those services are available on the same terms and conditions to unaffiliated providers of services, and (2) May not have access to any customer network information associated with Ameritech Illinois' provision of local exchange service that would assist ADDS in developing, designing or marketing, or otherwise providing its services, unless that information is obtained with the express permission of the customer or is made available to other advanced services providers. ICC Order, Docket No. 94-0308 (August 16, 1995). On the other hand, the FCC conditions would allow: (1) The advanced services and the ILEC to conduct exclusive joint marketing and customer care provisioning between the advanced services affiliate and the ILEC, including the transfer of customers identified by the ILEC (FCC Conditions, ¶ 27.a); (2) The advanced services affiliate and the ILEC to share exclusive access, during a transitional period, to certain functionality associated with advanced services equipment (FCC Proposed Conditions, ¶ 27.c.), and (3) The ILEC, during a grace period, to transfer to the

In short, because there has been no opportunity for discovery, because hearing time has (necessarily) been limited, and because as a result Intervenors have been unable to present *their* direct case on the impact of the Proposed FCC Conditions, questions such as those with respect to the Platform remain. And the responsibility for that inadequate state of the record lies directly with the Joint Applicants. It is they who are responsible for the timing of the FCC document, and it is they who, out of a desire to get the merger past this Commission at all cost and in all haste, have still not explained their own conditions and their own undertakings concretely, and straightforwardly, to this Commission. In these circumstances, the record is fatally deficient, and it is inadequate to support approval of the merger.

II. The Commission's June 4 Questions and Issues

COMPETITION

1. An explanation of whether SBC is or is not an "actual potential competitor" in Illinois, as the term has been used throughout this proceeding.

Joint Applicants have again failed to meet their burden on the issue of whether losing SBC as a competitor has a significant adverse effect on competition in Illinois. In the initial proceeding, Joint Applicants claimed that SBC was not an actual potential competitor. The Commission was not persuaded and asked Joint Applicants to reopen the record to reconsider this issue. Joint Applicants' evidence on reopening is similarly deficient.

---

advanced services affiliate on an exclusive basis advanced services equipment (FCC Proposed Conditions, ¶ 28.)

As a threshold matter, it must be recalled that the actual potential competition doctrine is an antitrust principle. However, the question before the Commission is not limited strictly to antitrust but is the broader one of whether the loss of SBC as a competitor through this merger would have a significant adverse effect on competition in Illinois. Joint Applicants cited no cases in the initial proceeding to support their claim that this Commission is bound by the Merger Guidelines. Indeed, as the Commission will recall, Joint Applicant witness Dr. Harris testified that the Illinois Public Utilities Act does not require the Commission to use the Merger Guidelines.[29]

Moreover, the case law strongly supports AT&T's position that the Merger Guidelines are not dispositive and are only of secondary importance, serving to confirm, not supplant, the Commission's own expert analysis of competition. *See In re Transfer of Control Applications of TCI and AT&T,* FCC No. 99-24, MO&O ¶ 14 (Feb. 18, 1999) (FCC's analysis is not "limited by traditional antitrust principles." In the telecommunications industry, "competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interactions of firms."); *In re Transfer of Control Application of WorldCom and MCI,* FCC No. 98-225, MO&O ¶¶ 12-14 (Sept. 14, 1998) (While the FCC's "analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them. . . . [I]t is possible that the antitrust agencies might well approve a merger that does not decrease the current level of competition but that does impede the development of future competition."); *In re Transfer of Control Application of*

[29] Harris Dir. (SBC/Ameritech Ex. 4.0) at 8.

Nynex and Bell Atlantic, FCC File No. NSD-L-96-10, MO&O ¶ 32 (Aug. 14, 1997) ("Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by antitrust laws."); *Id.* ¶ 68 (FCC will not apply Merger Guidelines potential competition provisions "mechanistically to the novel features of telecommunications markets . . ."); *Id.* ¶ 136, 143.

Joint Applicants' responses to the Commission's June 4 letter are contained in their June 7 letter[30] and the Direct Testimony on Reopening of James Kahan.[31] The responses are taken nearly verbatim from Joint Applicants' briefs in the initial proceeding. Mr. Kahan indicates in his Direct Testimony on Re-Opening that Joint Applicants have nothing to offer beyond these briefs.[32] Finally, asked on cross-examination whether Joint Applicants had presented any new evidence regarding actual potential competition, Mr. Kahan replied that they had not.[33] Mr. Kahan's response is dispositive – Joint Applicants failed to meet their burden on this issue in the initial proceeding, have proffered no new evidence and therefore have failed to meet their burden again.

COMMITMENTS

In its review of the Interconnection, OSS, Performance Measurement and NatLoCo Commitments, the Commission should keep in mind the following four questions:

1. Is the commitment substantive or illusory?

[30] Ex. 6 to Amended Joint Application.

[31] SBC/Ameritech Ex. 1.3

[32] Kahan DOR (SBC/Ameritech Ex. 1.3) at 3.

[33] Tr. at 1848 (Kahan).

2. Is the commitment clear and straightforward or ambiguous and laden with exceptions?

3. Does the commitment add value to the competitive process or does it simply maintain the status quo?

4. Is the commitment enforceable?

INTERCONNECTION

2. The manner, necessary actions and timetable by which the Joint Applicants would provide to CLECs in Illinois services, facilities or interconnection agreements which SBC has made available to CLECs in its other service territories.

Joint Applicants' Interconnection Commitments are not commitments at all. They offer nothing in the way of promoting competition. Instead, they are a smokescreen, giving an illusion that they are designed to promote competition. As discussed below, these "commitments" are riddled with exceptions that rob them of any meaning. Moreover, instead of providing for penalties or enforcement mechanisms that might encourage compliance, Joint Applicants' proposal calls for arbitration or Commission complaint proceedings – a right to which CLECs are already entitled.

Consider what the Joint Applicants could have offered on this issue. Joint Applicants could have filed a list of UNEs, services, facilities and interconnection arrangements not currently offered in Illinois that they are willing to implement in Illinois immediately after the merger. They could have offered prices. At a minimum, they could have established prices (or price caps) on important elements, such as shared transport. They could have made the Illinois commitments consistent with the FCC commitments,

the Indiana commitments and Ohio commitments. They could have presented the proposed commitments in a timely manner.

Instead, Joint Applicants offer proposed conditions on interconnection that are ambiguous, illusory and that intentionally lead only to more costly and time-consuming arbitration and litigation. It is not the responsibility of the Commission or Intervenors to cure these deficiencies. Joint Applicants made the decision to advocate meaningless "commitments" and now must live with that decision. The proposed commitments do nothing to remedy the anticompetitive effects of the merger.

In-Region Interconnection Commitment

The In-Region Interconnection Commitments (Illinois Commitments A and B, FCC Commitments § 52) are not even facially valid. SBC and Ameritech commit to provide in Illinois only UNEs, services, facilities or interconnection arrangements that they *voluntarily* agree to in other in-region states. Arbitrated provisions are excluded. However, as the Commission knows, the provisions most valuable to CLECs are naturally the most contentious.[34] This commitment thus expressly excludes the most valuable provisions. In response, SBC/Ameritech argue that they are not legally required to make arbitrated provisions automatically available. That is true, but it only highlights a major flaw underlying the Joint Applicants' proposals: They refuse to offer anything of substance beyond their existing legal obligations. A "commitment" to honor an already-existing legal duty is not a true commitment.

The interconnection commitments are nothing more than a promise to abide by Sections 251 and 252 of the Telecommunications Act. Section 251 directs ILECs such as SBC and Ameritech to interconnect and provide unbundled network access to CLECs. Section 252 gives CLECs the right to arbitrate these issues. The interconnection commitments do nothing to eliminate or even streamline costly and time-consuming arbitration. Instead, the "commitments" are designed in a manner that will only encourage more arbitration and litigation. They add nothing to the competitive process.

[34] Gillan DOR (AT&T Ex. 1.2) at 11-12.

Even if one accepts Joint Applicants' premise that the interconnection commitments are meritorious, they are so riddled with exceptions that they are rendered useless. The exceptions to the In-Region Interconnection Commitments, for example, are:

Exception No. 1

As noted, this commitment applies only to provisions voluntarily agreed-to by SBC. If a CLEC wants an arbitrated provision, it must arbitrate *that* issue in Illinois (as is the case now).[35] Given their track record, Joint Applicants cannot plausibly argue now that they will not routinely arbitrate such requests.

Exception No. 2

No provisions are offered automatically. CLECs must first go through a workshop or collaborative process to discuss the provisions.[36] This process begins either 30 days after the merger closing date[37] or 90 days after closing,[38] depending upon which of Joint Applicants' inconsistent testimony is to be believed. The collaborative process lasts 60 days.[39] On Day 120, the Staff is to submit a report to the ICC concerning the collaborative process. Thus, *four months* after the merger, no provisions will have been imported into Illinois. At that point, CLECs can begin *negotiating* changes to their interconnection

[35] Tr. at 1859 (Kahan).

[36] Kahan DOR (SBC/Ameritech Ex. 1.3) at 6 (Commitment B).

[37] Kahan DOR (SBC/Ameritech Ex. 1.3) at 9.

[38] Ex. 6 to Amended Joint App. at 9.

[39] Kahan DOR (SBC/Ameritech Ex. 1.3 at 9.

agreements. When negotiations fail, a CLEC's only recourse is arbitration (as it is now).[40]

[40] Tr. at 1858 (Kahan).

Exception No. 3

Under the Proposed FCC Conditions, only provisions in interconnection agreements that are signed by SBC after the merger closing date are eligible to be "imported" into Illinois .[41] The hundreds of interconnection agreements that SBC has entered into to date are ruled out of bounds by this exception. Joint Applicants claim that Illinois CLECs will not be affected by this provision because the Illinois commitments do include this limitation.[42] However, the significant questions have not been answered: Why are the commitments inconsistent to begin with? And, what assurances do CLECs have that Joint Applicants will not try to enforce this FCC condition in Illinois?

Exception No. 4

Provisions that are not "technically feasible" in Illinois are excluded. Illinois CLECs are understandably skeptical of this exception. Shared transport has not been "technically feasible" according to Ameritech for the past three years (although other RBOCs and ILECs found it feasible). Suddenly, shared transport has become technically feasible 30 days after closing, if the merger is approved. Moreover, technical feasibility will be "addressed in interconnection negotiations."[43] In other words, the issue will be determined by Joint Applicants, at their sole discretion. If CLECs do not like the result, they can arbitrate. There is no difference between this "commitment" and the status quo.

[41] FCC Proposed Conditions ¶ 52.

[42] Tr. at 1868-69 (Kahan).

[43] Ex. 6 to Amended Joint App. at 4.

Exception No. 5

Prices are not imported. While this exception appears reasonable on its face, it crumbled on cross-examination. Ameritech witness Gebhardt made it very clear that Ameritech has no intention of offering reasonable pricing for shared transport any time soon, even though there is already a Commission-ordered interim price for shared transport. Ameritech, however, contends -- conveniently -- that the price is for a shared transport that is different than the shared transport it now commits to offer. Ameritech knows that CLECs cannot offer shared transport without a price. It also knows that the Commission's TELRIC dockets are enormously complex and lengthy. The Ameritech TELRIC docket was initiated in August 1996 and a Second Interim Order was issued on February 17, 1998. The follow-on compliance proceeding (ICC Docket No. 98-0396), which includes permanent pricing for shared transport, began in June 1998. As Joint Applicants have stated, the current TELRIC docket "is currently not active."[44] However, Joint Applicants neglected to inform the Commission that the docket is "not active" as a result of their motion for a general continuance of that proceeding and that *this merger docket* was used as a basis for that motion.[45]

Thus, agreeing to provide a service or facility is but one step on the path to actual implementation. Ameritech's failure to honor the interim price for shared transport, its refusal to offer interim pricing for the "new" shared transport, and its delay tactics in the current TELRIC pricing docket is not encouraging behavior. It is clear that Joint

[44] Joint Applicant June 7 Response to Commission's June 4 Letter at 13.

[45] Ameritech Motion for General Continuance ¶ 4, ICC Docket No. 98-0396 (May 3, 1999).

Applicants intend to use pricing to ensure themselves indefinite further delay in opening the Illinois market.

Exception No. 6

The commitment to import provisions from SBC territory is limited by "changes in applicable law or state or federal requirements."[46] For example, "if the FCC ultimately determines that, under TA 96, Joint Applicants are not required to provide shared transport, Joint Applicants will not continue to provide it."[47] Note that Joint Applicants *do not commit* to providing shared transport (or anything else) if an ICC Order goes further than an FCC Order.

Exception No. 7

Before a provision is imported, the "source of the term or condition" must be considered.[48] There is no evidence as to what this exception means.

Exception No. 8

"Underlying costs" must be considered before a provision can be imported.[49] There is no evidence indicating how this exception is to be applied. As written, this exception bars the importation of any provision that SBC/Ameritech unilaterally determines is too costly.

[46] Kahan DOR (SBC/Ameritech Ex. 1.3) at 7.

[47] Kahan DOR (SBC/Ameritech Ex. 1.3) at 33.

[48] Kahan SDOR (SBC/Ameritech Ex. 1.4) at 2.

[49] Kahan SDOR (SBC/Ameritech Ex. 1.4) at 2.

Exception No. 9

This in-region interconnection commitment expires after three years[50] If pricing for a provision is delayed for one or two years, the commitment is not extended.[51] If electronic ordering systems are not in place for two years (which Joint Applicants admit is likely), the commitment is not extended. This scenario is not far-fetched; rather, it is a likely outcome if these commitments are adopted. Ameritech has already indicated that pricing and ordering systems are not in place now and will not be in place for, in some cases, up to two years. The Commission should also note that the Bell Atlantic/Nynex commitments, which have proved to be insufficient, last four years.[52] Furthermore, Joint Applicant witness Dr. Gilbert conceded under cross-examination that the effects of the merger could be measured for as long as five years.[53]

Exception No. 10

The Commission's June 4 letter specifically inquires into timetables for the interconnection commitments. However, there is no "specific timetable" for implementation of this commitment.[54] Thus, Joint Applicants are not required to import any provisions by a date certain.

---

[50] Kahan DOR (SBC/Ameritech Ex. 1.3) at 32.

[51] Tr. at 1906 (Kahan); Tr. at 2074-77, 2126-2128 (Gebhardt).

[52] *BA/Nynex Order* ¶ 232; *Id.* at Appendix C ¶ 8.

[53] Tr. at 2146-47 (Gilbert).

[54] Kahan DOR (SBC/Ameritech Ex. 1.3) at 8.

Exception No. 11

Contrary to the Commission's June 4 letter , Joint Applicants do not propose any "penalties" for failing to comply with the in-region interconnection commitment.[55] Consequently, not only is this commitment meaningless, it is toothless.

Exception No. 12

If SBC and Ameritech feel the Commission allocates too much of the merger savings to Illinois consumers, Joint Applicants reserve the right to pull the plug on this commitment.[56] This exception is more of an idle threat – if the Commission does not do SBC/Ameritech's bidding, Joint Applicants may not go through with the merger. The Commission should ignore such posturing.

[55] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11; Tr. at 1865 (Kahan).

[56](Kahan DOR (SBC/Ameritech Ex. 1.3) at 31.

Out-of-Region Interconnection Commitment (Commitment D)[57]

Although the In-Region Interconnection is heavily caveatted, the Out-of-Region Commitment is even worse. Joint Applicants commit that they will have the burden to show why provisions they obtain out-of-region (as part of the National-Local strategy) should not be offered in Illinois. How this commitment improves upon the status quo is a mystery. Today, if AT&T wants a UNE that Bell Atlantic offers but Ameritech does not, AT&T can request that UNE from Ameritech. After "negotiations" fail and Ameritech makes its final refusal, AT&T has a right to arbitrate the issue before the Commission pursuant to Section 252 of TA 96. Commitment D does not change that scenario at all.

Even if one somehow believes there is a change to the status quo, the Out-of-Region Commitment is also riddled with limitations and exceptions that rob it of any meaning.

Exception No. 1

The Federal Commitment applies only to out-of-region provisions Joint Applicants win through arbitration.[58] The Illinois Commitment applies to both arbitrated and negotiated agreements.[59] Joint Applicants claim that the Illinois Commitment will control but do not explain the inconsistency and also do not explain how this provision of an FCC Order could be ignored in Illinois. The magnitude of this exception is dwarfed, however, by the following exception.

---

[57] Interconnection Commitment C is a commitment to make out-of-state interconnection agreements available in Illinois. These are already public documents, however, pursuant to Section 251(h)of the federal Telecommunications Act. Tr. at 1877-78 (Kahan).

[58] Proposed FCC Conditions ¶ 51.

[59] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

Exception No. 2

Most Favored Nation ("MFN") provisions are excluded. Under the Telecom Act, carriers are permitted to "pick and choose" provisions from an ILEC's interconnection agreement with another carrier.[60] For example, if SBC/Ameritech enters New York, it could pick and choose provisions from the scores of interconnection agreements Bell Atlantic has with other carriers. However, any MFN provisions SBC/Ameritech picks and chooses from other Bell Atlantic agreements *will not* be imported into Illinois.

This exception is not pure happenstance; it is an intentional part of the commitment game Joint Applicants are playing with this Commission. SBC and Ameritech know that many of the valuable (procompetitive) provisions have already been won through arbitration by CLECs. As a consequence, Joint Applicants will not have to arbitrate these issues, will be able to get them out of region through MFN clauses, and therefore will not be required to make these provisions available in Illinois. In addition, SBC/Ameritech has little incentive to negotiate or arbitrate strong market-opening provisions that must be then made available in its home regions when the vast bulk of its revenues will be derived from its own ILEC operations.[61] SBC and Ameritech will not make these MFN provision available in Illinois even though opting into MFN provisions is a "fairly standard CLEC practice that Joint Applicants will no doubt use,"[62] in part

---

[60] 47 U.S.C. § 251(i).

[61] Gillan DOR (AT&T Ex. 1.2) at 16.

[62] Kahan DOR (SBC/Ameritech Ex. 1.3) at 13.

because it is a means for "quickly entering into business" for a CLEC.[63] Finally, it is important to note the careful distinction Joint Applicants observe between negotiated and arbitrated *agreements* and MFN *provisions.* Most, if not all, interconnection agreements today contain MFN provisions – including those that are arbitrated and negotiated. For instance, a CLEC entering New York may have 100 issues in its interconnection agreement with Bell Atlantic. It may arbitrate 10 of those issues, which means that it has an arbitrated interconnection agreement. However, that arbitrated agreement contains 90 MFN issues. Joint Applicants themselves do not know if the MFN exception applies in this commonplace scenario:

> Q. What if that arbitrated agreement includes most favored nation terms, are those terms excluded?
>
> A. I don't know, to be honest with you.[64]

Exception No. 3

Out-of-region provisions are made available in Illinois only to "similarly situated CLECs."[65] The determination of who is and who is not similarly situated is left entirely up to Joint Applicants.

Exception No. 4

Joint Applicants maintain that CLECs that request provisions identical to those obtained out-of-region by SBC, but with different "volume," "term" or "area of service

[63] Kahan SDOR (SBC/Ameritech Ex. 1.4) at 3.

[64] Tr. at 1882 (Kahan).

[65] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

commitments" are not similarly situated.[66] There is absolutely no evidence describing what this exception means – another limitation solely in the discretion of SBC and Ameritech.

Exception No. 5

To be similarly situated, a CLEC must agree to the "same terms and conditions concerning any relevant issues such as signaling requirements and interconnection arrangements as are in Joint Applicant's CLEC's interconnection agreement."[67] There is no evidence as to what this exception means. Furthermore, the decision as to what is a "relevant issue" rests entirely with Joint Applicants.

Exception No. 6

Out-of-region provisions do not automatically become available to Illinois CLECs once they are obtained by SBC's NatLoCo CLEC. Instead, CLECs must begin a negotiation process[68] Because CLECs already have the right to negotiate these provisions, this commitment is nothing more than a restatement of the status quo.

Exception No. 7

Out-of-region provisions that are not "technically feasible" in Illinois are excluded. As discussed above, Ameritech has a history of manipulating baseless claims of technical infeasibility to its advantage. Again, there are no limits on this exception – it is decided solely by Joint Applicants; there are no penalties; and if CLECs don't like it, they can arbitrate.

---

[66] Joint Applicant Response to Commission's June 15 Letter at 10.

[67] Joint Applicant Response to Commission's June 15 Letter at 10.

[68] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

Exception No. 8

"Technical feasibility" and "similarly situated" are dependent upon consideration of "regulatory, network and market circumstances." Joint Applicants' attorneys should have a field day with the ambiguity of this exception during negotiations with CLECs and when these issues are arbitrated. Indeed, Mr. Kahan's testimony on this exception was revealing in its lack of revelation:

Q. What do you mean by market circumstances?

A. I don't know.[69]

In other words, this exception means whatever Joint Applicants' attorneys say it means during negotiation/arbitration.

Exception No. 9

"Technical feasibility" and "similarly situated" are further dependent upon considerations of "network architecture, OSS, and universal service reform."[70] Again, Mr. Kahan's testimony hits the nail on the head:

Q. I know what universal service reform is, but how does that apply to this commitment.

A. I don't know.[71]

Exception No. 10

---

[69] Tr. at 1884 (Kahan).

[70] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

[71] Tr. at 1884 (Kahan).

This commitment ends three years after the merger closing date.[72] This sunset provision is too short for various reasons. Chief among those reasons is the fact that no progress will be seen from certain interconnection provisions for 1-2 years (e.g., shared transport). If no benefit is realized until Year 2 and the commitment expires in Year 3, it is not much of a commitment.

Exception No. 11

The commitment to import provision into Illinois is subject to changes in the law. SBC and Ameritech never explain which law controls nor do they indicate whether they intend to challenge any law upon which this commitment rests. Joint Applicants also do not commit to reciprocity; i.e., they do not state that they will continue to make services and facilities available in Illinois as long as they continue to receive those services and facilities themselves out of region, regardless of the state of the law.

Exception No. 12

As with the In-Region Commitment, Joint Applicants "do not propose any penalties" or any other enforcement mechanism.[73]

Exception No. 13

There is no established pricing. Prices are to be determined by the TELRIC rules established in ICC Docket No. 96-0486 (Ameritech TELRIC docket).[74] As previously

[72] Kahan DOR (SBC/Ameritech Ex. 1.3) at 32.

[73] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

[74] Kahan DOR (SBC/Ameritech Ex. 1.3) at 11.

discussed, Ameritech has continued the current TELRIC proceeding, using this merger as a justification for its motion.

Exception No. 14

Finally, CLECs cannot import interconnection agreement terms and conditions without regard to "context, source or implication."[75] To the extent that the 13 exceptions listed above do not wipe out any attempt to import new interconnection provisions into Illinois, this last catchall exception does the job.

* * *

In short, by the time Joint Applicants finish applying their exceptions and escape clauses, there is nothing of substance left of this commitment. Not surprisingly, Mr. Kahan was unable to identify a single UNE, service, facility or interconnection arrangement that would make it through the maze of exceptions and be imported into Illinois.[76] The interconnection commitments, both in Illinois and at the FCC, are wholly unresponsive to the Commission's June 14 letter. They also flunk the four-factor test AT&T proposes because they are: (1) illusory; (2) robbed of any meaning by their numerous exceptions; (3) without value and are designed to maintain the status quo; and (4) not enforceable.

Shared Transport

3. The manner, necessary actions and timetable by which the Joint Applicants would provide "Shared Transport" as recommended by the Commission Staff

[75] Kahan DOR (SBC/Ameritech Ex. 1.3) at 12.

[76] Tr. at 1877 (Kahan).

in this proceeding. Further, until the "Illinois version" of Shared Transport is offered, when the Commission can expect the implementation of Shared Transport in the same manner as SBC has provided in Texas, and the manner, necessary actions and timetable by which this will be accomplished; and

Unbundling

6. Provision of local switching in a commercially feasible manner, including customized routing of operator services and directory assistance.

The Commission's concerns in Questions 3 and 6 arise from Ameritech's adamant refusal for the past three years to provide Shared Transport and Unbundled Local Switching, despite the FCC's and this Commission's repeated orders to do so.[77] Ameritech's refusal to provide Shared Transport and Unbundled Local Switching has amounted to a refusal to provide the UNE Platform.[78] Given Ameritech's track record on these issues, the Commission reasonably expected Joint Applicants to make a firm and unqualified commitment to provide Shared Transport and Unbundled Local Switching. Joint Applicants responded with a "new" proposal - - offering "interim" and "long-term"

[77] The unbundled network elements (UNEs) of Shared Transport – also referred to as Common Transport – and Local Switching are essential components of the "UNE Platform" or combination of unbundled network elements provided for in AT&T's Commission-approved Interconnection Agreement with Ameritech. Quite simply, Shared Transport is an unbundled network element consisting of the same interoffice transport facilities used by Ameritech to transport the calls made by its own local exchange customers. As such, Shared Transport is a common interoffice transmission path between Ameritech switches**.** Competitive local exchange carriers ("CLECs") can use the Shared Transport UNE in conjunction with the Unbundled Local Switching element to transport local calls dialed by the Local Switching element to their destination over Ameritech's Shared Transport network. *See further discussion of Shared Transport in Direct Testimony on Re-Hearing of Steven Turner, AT&T Exhibit 6.0, at pages 3-4.*

[78] The Platform is a combination of network elements that permits a CLEC to offer a full range of telecommunications services to end users and other carriers. The Platform consists of the Network Interface Device, Unbundled Loop, Local Switching, Shared (*i.e.*, Common) Transport, Signaling and Call-Related Databases, Tandem Switching and Ameritech-provided Operator Services and Directory Assistance. At the option of the requesting CLEC, the Platform may exclude Operator Services and Directory Assistance.

versions of Shared Transport.[79] Given Ameritech's history, however, its interim offer is operationally meaningless and even the "long term" solution will not be usable until the necessary OSS systems to support it are specified and operation. Moreover, Joint Applicants continue to couch their proposal in carefully worded caveats reminiscent of the semantics games and legal maneuvering that have long characterized Ameritech's conduct with these issues. In short, Ameritech should be actually to provide shared transport, but Joint Applicants should not be rewarded for promising to meet their obligations through approval of the merger[80]

A. Ameritech's Long History of Refusing to Provide Shared Transport

Ameritech's long history of refusing to provide Shared Transport and its flouting of Commission and FCC Orders is all too familiar. AT&T will not (and need not) repeat that troubling conduct here.[81] Suffice it to say, the FCC has ordered Ameritech to provide Shared Transport both in its First Report and Order dated August 8, 1996, and in its Third Order on Reconsideration dated August 17, 1997. This Commission also ordered

---

[79] Joint Applicants now offer to implement in Illinois "a form" of Shared Transport within 30 days of the merger closing date. They refer to this as the "interim solution." In addition, within one year of the merger closing, Joint Applicants will implement and offer in Illinois the same version of Shared Transport, involving the use of Advanced Intelligent Network ("AIN"), as SBC has implemented in Texas. They refer to this as the "long-term" solution. *See* Direct Testimony on Reopening of Terry Appenzeller, SBC/Ameritech Exhibit 12.0, at pages 4-12.

[80] Staff indicated that Joint Applicants had been responsive to the Commission's concerns regarding shared transport (with some exceptions), but Staff witness Gasparin acknowledged that he had not taken pricing, OSS systems or the impact of the (inconsistent) FCC shared transport commitment into account. Tr. at 2627-2629.

[81] For a summary of Ameritech's longstanding refusal to provide Shared Transport, AT&T refers the Commission to the Direct Testimony of Bruce Bennett, AT&T Exhibit 2.0, at pages 5-24; and Direct Testimony on Reopening of Steven Turner, AT&T Exhibit 6.0, at pages 4-8.

Ameritech to provide FCC-defined Shared Transport in its Order dated February 17, 1998 in ICC Docket Nos. 96-0486/0569. To this day, Ameritech stands alone among all RBOCs in refusing to honor its legal obligations with regard to Shared Transport.

The basis for Ameritech's recalcitrance is obvious. With Shared Transport, CLECs can utilize Ameritech's common transport network between an Ameritech tandem and an Ameritech end office. Without the ability to share the interoffice transport facilities that are already in place, CLECs would need to build or purchase dedicated interoffice transport facilities, which essentially parallel or duplicate the existing facilities of the incumbent in order to provide call routing for their local service customers. This would be prohibitively expensive and wholly unnecessary, since the existing facilities have sufficient capacity to transport current traffic volumes.

Joint Applicants' response to Questions 3 and 6 provides no solace that Ameritech has reformed its ways. For example, in his pre-filed testimony and under cross-examination, Mr. Appenzeller couched his discussion of Ameritech's Shared Transport proposal in carefully chosen words: "Although I am not a lawyer, I understand that Ameritech currently has no legal obligation to provide Shared Transport."[82] Mr. Appenzeller admitted using the word "currently" to refer to the fact that Shared Transport, indeed all UNEs, are under review in the FCC Remand Proceeding.[83] What Mr. Appenzeller carefully omitted from his discussion is that for the period beginning in August of 1996, Ameritech *did* have a clear legal obligation to provide Shared Transport,

[82] Appenzeller DOR (SBC/Ameritech Ex. 12.0) at 4; Tr. at 2369-70.

[83] Tr. at 2369 (Appenzeller).

but it simply refused to do so while litigating the issue repeatedly before the FCC, this and other state commissions, and in the federal courts.

True to form as well is the caveat Mr. Appenzeller attaches to the current "rock-solid" promise to provide Shared Transport: "Joint Applicants commitments in this regard are subject to their being found to have a legal obligation to provide Shared Transport as a UNE in the FCC's UNE Remand Proceeding and thereafter."[84] In other words, Joint Applicants' "commitment" will evaporate if and when it can be avoided through further resort to the legal process.[85] Moreover, by the logic Ameritech has used for the past two years, even if it loses the issue before the FCC, it would nonetheless not consider itself legally obligated to provide shared transport while it exercised its "legal rights" on appeal.

Indeed, Mr. Appenzeller could not even avoid waffling on whether Ameritech *could* implement its "interim" solution absent the merger with SBC. After first avoiding a straightforward answer to this question in a data request, Ameritech finally admitted in a follow-up response (sponsored by Mr. Appenzeller) that "from a purely technical and operational perspective, it *could* implement both the interim and long-term versions of shared transport described by Mr. Appenzeller absent the merger."[86] Under cross-examination, however, Mr. Appenzeller flip-flopped again and effectively rejected his discovery response that Ameritech *could* indeed provide shared transport absent the

[84] Appenzeller DOR (SBC/Ameritech 12.0) at 4; Tr. at 2369-70.

[85] Tr. at 2369-70.

[86] *Compare* AT&T Cross Ex. D (Ameritech Response to AT&T Data Request 1-5) *with* AT&T Cross Ex. E (Ameritech Response to AT&T Data Request 2-2).

merger.[87] Mr. Appenzeller's coy testimony is typical of Ameritech's historical positioning on Shared Transport.

Moreover, it is startling that Mr. Appenzeller would claim that no CLEC has requested Unbundled Local Switching.[88] Again, Ameritech is persisting in playing a semantics game. For Ameritech, "unbundled" means "physically separate," but that is an argument that has been rejected by the FCC, by this Commission, and now by the Supreme Court.[89] The fact is that AT&T and other CLECs have requested Local Switching as part of the UNE Platform, only to confirm through rejected orders that Ameritech will not provide it. For Ameritech to persist in such misleading assertions at this juncture calls into question the bona fides of what they are proposing to the Commission in this docket. This Commission must ask itself: "Can Ameritech be trusted?"

B. The "Interim" Solution is Useless in Today's Circumstances.

Although, as explained below, Joint Applicants' so-called interim solution is useless in today's circumstances, it should first be noted that this "solution" is the *exact same* proposal that AT&T made to Ameritech nearly two years ago.[90] Indeed, AT&T and

---

[87] Tr. at 2372-82.

[88] Appenzeller DOR (SBC/Ameritech Ex. 12.0) at 13.

[89] *Iowa Utilities Board*, __ U.S. __, 119 S. Ct. 721 (1999). Ameritech is in fact the only incumbent LEC that has made the ludicrous claim that Shared Transport cannot be unbundled because it cannot be physically separated from Unbundled Local Switching. However, Ameritech has never stated that it would not offer Unbundled Local Switching even though it cannot be separated from unbundled Signaling.

[90] *See* Turner DOR (AT&T Ex. 6.0) at 9.

Appenzeller's testimony and AT&T devised a proposal – dubbed "Rough Justice" – that was identical to Ameritech's current "interim solution." Ameritech in fact included that

Michigan.[91] Equally outrageous is Ameritech's testimony that despite all the so-called

over the past three years, it now can (miraculously) implement interim Shared Transport in no more than 30 days. Clearly, Ameritech could have implemented this solution nearly two years ago. Instead, it chose to manipulate the legal process, at great expense and loss

Ameritech's "interim solution" merely confirms that it has been playing a series of semantics games with the Commission and with CLECs over Shared Transport.

associated not with Shared Transport but with implementing the Unbundled Local Switching element. As Mr. Turner testified, in 1996, Southwestern Bell in negotiating

Transport (*i.e.*

Transport was not an issue between AT&T and Southwestern Bell. It was not until the middle of 1997 that Southwestern Bell notified AT&T that it would require the

---

See
No. 97-137, Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan.

associated with the *Unbundled Local Switching* (not Shared Transport) element.[93] In short, the AIN "solution" has absolutely nothing to do with the Shared Transport unbundled element. Ameritech's eleventh-hour offer of the AIN solution as the permanent means to provide access to the Shared Transport element is simply its effort to "spin" once again why it has not provided access to this unbundled element up to this point.[94]

Finally, the "interim solution," which AT&T developed two years ago, is in fact not usable in today's circumstances. That is, making Shared Transport or the Platform available in the abstract is meaningless. Without the ability to order the UNE Platform electronically, it might as well not be available at all from the standpoint of a CLEC desiring to serve mass-market customers.[95] At the same time, as discussed further below, Joint Applicants are saying it will be months before they will have settled on the ordering and other OSS systems that they will implement in the wake of the merger – and these are the systems to which CLECs will have to design and build *their* systems in order to be able to pass orders electronically to the ILEC. In effect, then, Joint Applicants are proposing that CLECs develop complicated and costly systems that are temporary and that would

---

[92] Tr. at 2384-85.

[93] *See* Turner DOR (AT&T Ex. 6.0) at 9-10.

[94] There are two other points that should be noted relative to Ameritech's proposal of the AIN solution. *First*, AIN is not the only solution available for solving the three problems discussed in this paragraph. Bell Atlantic, for instance, used a non-AIN solution to handle the recording problems associated with Unbundled Local Switching. The point is that if Ameritech spent less time fighting these issues and more time resolving them, this industry would not still be at least another two years away from having access to the Platform in Illinois. *Second*, Mr. Hopfinger discusses in his testimony the amount of time and money that SBC has spent in implementing AIN in its territory. However, AIN is used for many other functions than just solving the recording and customized routing issues described above. In fact, Mr. Hopfinger's admission that SBC started the implementation of AIN over five years ago confirms this. Id. at 10.

soon have to be replaced when the permanent systems become available. It makes no sense for CLECs to undertake the costly and time-consuming development efforts to *their* systems in advance of knowing what a post-merger entity's long-term systems

Illinois anyway, the only prudent course of action for CLECs in Illinois, if the merger were approved, would be to develop interfaces to Southwestern Bell's systems. In sum, Joint

C. Joint Applicants' "Long-Term" Solution is Dependent upon Successful Resolution of Myriad Systems Problems.

Shared Transport long ago. Because of its refusal to do so, the critical issues today with the Joint Applicants' "long-term" solution involve the necessary OSS and other systems

order to support the ordering of the Platform. Unless the UNE Platform can be ordered efficiently and reliably (and electronically), it cannot be used by CLECs to serve mass

i.e., it might as well not be "available" at all.

i.e., at parity with the ILEC's) and reliable

service is a very large and resource-intensive undertaking for all concerned. SBC witness Mr. Viveros has proposed a timetable that requires two years to collaboratively implement

---

95

[96] To date, AT&T has invested tens of millions of dollars and more than two years of effort and properly interfaced with Southwestern Bell's systems. Turner DOR (AT&T Ex. 6.0) at 11.

system interfaces between the Ameritech/SBC combined entity and CLECs. That estimate is not inconsistent with AT&T's experience in attempting to establish system interfaces with Southwestern Bell in Texas.[97] The problem here is that we are practically at "ground zero" because Ameritech has not offered the UNE Platform. Consequently, in the absence of a "product" offering and specifications for the ILEC's systems for ordering and provisioning, *etc.*, that product, it is not possible for CLECs to develop *their* systems.

Developing system interfaces to Ameritech's *existing systems* would, in the circumstances, be counterproductive and only delay the availability of workable OSS for the UNE Platform in the Ameritech region. We are already three years into implementing the federal Act and yet the Joint Applicants' proposal to this Commission is that they are two more years away from having systems interfaces available for CLECs to interconnect with. Clearly, Ameritech has not demonstrated a track record of establishing the work effort necessary to enable CLECs to electronically bond with its systems. Moreover, Mr. Viveros indicated in his testimony that Southwestern Bell has a pattern of integrating its acquisitions into Southwestern Bell's systems environment,[98] such that, if the merger were concluded, the *de facto* systems interface would be to Southwestern Bell's systems.

As noted above, AT&T and other CLECs have already invested two years in developing their interfaces to the Southwestern Bell systems. Consequently, if this merger

---

[97] *Id.* at 14.

[98] *See* Viveros SDOR (SBC/Ameritech Ex. 7.3) at 3 where he states: "SBC will continue to enhance and evolve its systems capabilities for retail and wholesale alike, across all operating territories, including Illinois if this merger is approved." Clearly, it is Southwestern Bell's intention to integrate its system environments across all of its territories making Mr. Viveros' offer for developing interfaces to Ameritech's existing systems moot.

were permitted to be consummated, it would only be prudent to leverage this work in Illinois. In Texas, there have been arbitrations and lengthy collaborative processes that largely dealt with system interface issues. Various CLECs, including AT&T, have developed systems that are interoperable with the SBC systems, software, and business rules. There is no reason to reinvent the wheel in Illinois.[99] Since several CLECs are near entering the market in Texas with a product offering using the UNE-Platform, if the merger were to go forward, the same systems interfaces should be available in Illinois under the same terms and conditions and SBC/Ameritech must allow CLECs to use their same systems to preorder, order, provision, bill and maintain the UNE-Platform in the Ameritech states as is done in Texas.

Moreover, given that Mr. Viveros has indicated that Southwestern Bell will eventually implement its systems in Illinois anyway, the only prudent course of action would be for CLECs in Illinois to develop interfaces to Southwestern Bell's systems under the scenario in which the merger is completed. Further, it is vital for Southwestern Bell to have *its* systems that are interconnected with CLEC systems integrated into Ameritech's systems in a definitive period of time. If not, CLECs may build the interface to Southwestern Bell's systems but not have flow-through capability into Ameritech's region due to Southwestern Bell not completing its own integration with Ameritech. Specifically, the Southwestern Bell systems that the CLECs will develop interfaces for must be able to interface with Ameritech's provisioning, maintenance, and billing systems in the Ameritech

[99] But that is precisely what Ameritech favors. Being solely responsible for the three-year delay in providing the Platform and OSS, Ameritech now argues against leveraging in Illinois work and knowledge that SBC, AT&T, and other CLECs gained in Texas. *See* Appenzeller ROR (SBC/Ameritech Ex. 12.1) at 10. This is nothing more than another wasteful delaying tactic of Ameritech.

territory so that orders/requests that are sent electronically to the Southwestern Bell systems are properly implemented in the Ameritech provisioning and maintenance systems.[100]

Finally, for the Joint Applicants' "long-term" solution to have any viability, indeed legitimacy, it would be critical that an independent, technically-skilled third party be engaged to design the testing and monitoring of the OSS.[101] There are many systems that Ameritech uses to provision its switches, ensure that loops have continuity to a customer's location, perform maintenance on the various components of its network, maintain information on its network and customers, and the like. These are often referred to as *back-office systems*. When CLECs develop their interface into the Southwestern Bell gateway systems – systems that permit many different CLECs to interconnect with Southwestern Bell and the subtending back-office systems – there is still a need to ensure that orders and requests flow from these gateways into the actual Ameritech systems that perform the work or hold the information. As such, despite the fact that system *interfaces* developed by Southwestern Bell in Texas will already be in use, there will still be a need to test the flow-through of orders into *Ameritech's back-office systems* and ensure that the system interfaces are capable of handling the types and volumes of orders that would be anticipated. The OSS test must be end-to-end, and thoroughly test pre-ordering, ordering, provisioning, maintenance and repair, and billing, including the integration of

---

[100] Turner DOR (AT&T Ex. 6.0) at 16-17.

[101] Staff indicated that third-party OSS testing was not necessary. However Staff witness McClerren indicated that the Commission has used consultants many times in the past and also indicated that he was unaware that 13 of the 14 states that have considered this issue have ordered third-party OSS testing. (Tr. at 2594-2622.

pre-ordering and ordering. The FCC's orders have required proof of access to these functions, all of which are imperative for full-scale commercial operation by competitors.

should be required over multiple days. Stress testing should occur at commercial volumes, as determined by the expected future demand in a competitive local market.

more of its territories into a single systems environment. Importantly, independent third-party testing can expedite the identification and resolution of problems with

can otherwise arise.[102]

* *

proposal to offer "interim" and "long-term" versions of the Platform must be viewed for what it is: A belated and disingenuous attempt to pacify the Commission in an effort to

approve the merger in part based on Ameritech's promise to stop violating its legal obligations. Certainly, however, there is nothing in Ameritech's three-year campaign of

merger promises.

Moreover, even under the most favorable light, Joint Applicants' "commitment" to

---

The third-party test plan advocated by AT&T is modeled in part after the New York third-party OSS test, which despite certain shortcomings is nevertheless superior to the Texas OSS test. Key

pro-competitive benefit. Their proposal is nothing more than a stop-gap pending the FCC issues a decision in the . If the FCC re-affirms the need for transport and local switching as unbundled network elements, then Joint Applicants will be

benefit. If, on the other hand, the FCC finds that either "local switching or transport is not a UNE nationally or in specific geographic areas" (¶ 41), then the "commitment" vanishes *id.*). And as a result of Ameritech's stonewalling, the OSS systems necessary to order

Consequently, Joint Applicants' Shared Transport commitment in Illinois and at the FCC (Condition VIII) is , from a practical standpoint, meaningless. Ameritech long ago should

was frivolous, and indeed in defiance of binding orders by federal courts, and numerous regulatory bodies, including the FCC and this Commission. The Commission should

issue into a merger-supporting condition.

4.

processes. (June 4, 1999 Letter.)

5.

to-application OSS interfaces which support pre-ordering, ordering, provisioning, maintenance, repair and billing of resold services, unbundled

graphical user interfaces. Alternatively, when would Ameritech Illinois offer CLECs direct access to its service order processing systems? (June 4, 1999,

In their testimony purporting to respond to these questions, Joint Applicants

to CLECs in Illinois in a three-phase process to be completed, at best, two years from merger closing. That two year period is wholly contingent on the assumption the three-phase process _____ result in any disputes.[104]

announced similar commitments at the FCC. There, Joint Applicants proposed two three-phase collaborative processes for development of (1) "uniform" application to application

as well as a region-wide change management process (to be negotiated within 12 months of merger closing). They also proposed a third three-phase collaborative with respect to options for pre-ordering components used to provide xDSL and other advanced services.

OSS collaborative in Illinois,[106]

meeting between SBC/Ameritech and the CLECs). In the federal collaboratives, Phase II is limited to one month, as opposed to two months in Illinois. At the end of that one

[103] Viveros DOR (SBC/Ameritech Ex. 7.2) at 4-6.

Viveros DOR (SBC/Ameritech Ex. 7.2) at 4-6.

[105]

[106] Under the FCC proposed conditions, the three-phase process in regard to development of merger closing. (Proposed FCC Conditions ¶ 11.) The FCC three-phase process in regard to development of uniform business rules would begin after completion of Phase II of the interfaces

[107] Proposed FCC Conditions ¶¶ 11(b), 14(b), 16(c)(2).

month, if agreement is not reached by the parties, SBC/Ameritech must then immediately notify the Chief of the Common Carrier Bureau and submit to him a copy of SBC/Ameritech's plan and list of the remaining issues.[108] The Chief must then issue an order directing SBC to implement its plan, or submit the matter to arbitration.

Based on the apparent similarities and overlap between the Illinois and FCC OSS conditions, by its July 9, 1999 letter, the Commission sought additional information regarding how these commitments work, asking SBC/Ameritech to provide the following information:

> **In Section III of SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech have committed to the FCC to implement an OSS Process Improvement Plan (the "FCC OSS plan"). This 3 phase FCC OSS plan seems to closely mirror the commitments reflected in SBC/Ameritech's testimony on reopening. Further, the FCC OSS plan calls for a "single workshop" to work collaboratively with CLECs under the ultimate direction of the Chief of the Commission Carrier Bureau of the FCC. If the FCC were to adopt the voluntary commitments of SBC/Ameritech, how would the FCC OSS plan overlap with the proposal put forth here in Illinois? If the FCC were to adopt the voluntary commitments of SBC/Ameritech, do SBC/Ameritech envision that the FCC OSS plan is controlling over Illinois or takes the place of the commitments reflected in their testimony on reopening? Please explain.**

What Joint Applicants have provided in response to the Commission's request for specific and detailed information are vague and indefinite promises about OSS. Those promises are devoid of substance about what Joint Applicants' future OSS proposals will actually contain, however. The Commission, as a result, still has no idea what system changes and OSS enhancements Joint Applicants will actually make, much less even

---

[108] *Id.*

propose to make, in Illinois. Joint Applicants offer only future promises to discuss and

The cross-examination of Mr. Viveros, SBC's OSS witness, only served to highlight the vagueness of Joint Applicants's OSS "commitment." Mr. Viveros conceded

and graphical user interfaces subsumed their Illinois OSS commitments. (Tr. 2171.) When asked whether Joint Applicants's commitment to deploy "uniform" application-to-

SBC/Ameritech's region, Mr. Viveros coyly answered "not necessarily." (Tr. 2157.) When asked whether that meant that SBC/Ameritech would deploy, at the very least, the

ordering and ordering UNEs – Mr. Viveros again would not commit, answering not necessarily. (Tr. 2158.) When asked whether, the commitment to implement "uniform"

same, Mr. Viveros again carefully hedged his answer, repeating "not necessarily." (Tr. 2158.)

What the Commission should take from these non-answers is that Joint Applicants's OSS commitments do "not necessarily" amount to anything. Mr. Viveros'

defining what they have, or have not, committed to in relation to developing and

[109] At the FCC SBC/Ameritech committed that within 14 months after the merger closing, Joint ordering xDSL and other advance service components. True to form, Mr. Viveros could not state what EDI enhancements he would make for pre-ordering, xDSL and other advanced services.

deploying new OSS interfaces in Illinois. Indeed, there is nothing on the record to indicate that Joint Applicants have committed to changing the status quo in any way in regard to Ameritech's OSS systems.

Joint Applicants attempt to blame the vagueness of their OSS commitments on their alleged inability to conduct post-merger planning. (SBC/Ameritech Ex. 7.2, p. 2.) The Commission should lend little credence to this self-imposed excuse, however. Indeed, the record established that while SBC/Ameritech were negotiating their OSS commitments at the FCC – and before their testimony was filed in the Illinois reopening case – not less than three meetings have taken place between SBC and Ameritech personnel regarding Ameritech's OSS systems. (Cross Ex. B; Tr. 2165-2168.) SBC's OSS witness Mr. Viveros was present at those meetings and admitted that he used them to attain "a much better understanding of what systems Ameritech currently offers its CLEC customers." (Tr. 2167-68.) When asked what he intends to do with that information, Mr. Viveros indicated that it would "assist" him "eventually in working through plans to integrate the systems of Ameritech and SBC." (Tr. 2168-69.)

These facts beg the question why SBC waited to the last minute before attempting to learn more about Ameritech's OSS systems? The answer is simple: this lack of information gave SBC an excuse when asked about their plans to deploy OSS systems post-merger. The Commission should reject SBC's attempt to manipulate the record and maintain "plausible deniability" with respect to their OSS "commitments."

Not only are Joint Applicants' OSS promises vague, they are illusory. They are based on the wholly unrealistic presumption that in just two months (one month under the

Proposed FCC Conditions) SBC/Ameritech can come to an amicable agreement with

corresponding business rules. Any dispute between Ameritech and the CLECs automatically triggers (under their proposal) an open-ended arbitration process that would

rules that CLECs and Joint Applicants may have agreed on in the collaborative.

Joint Applicants's schedule, open-ended as it is, for developing and deploying OSS

them from ever being achieved. The two-year timeframe – including the 18 month deployment and development Phase III – is itself is too long. In fact, in Ohio Joint

within six months of merger closing. (Ohio Stipulation and Recommendation, Section IV.A.3 ("SBC/Ameritech further agree to implement such improvements to Ameritech

given no excuse why it should take them so long to implement such OSS improvements in Illinois.

<u>if and only if</u> all of

within one or two months in all aspects of whatever implementation plans proposed by Joint Applicants. If all CLECs do not so acquiesce, the plan is subject to arbitration that is

application-to-application interfaces. Obviously, SBC has a strong incentive, and absolute

unilateral ability, to take a "take it or arbitrate it" position and thereby force these federal and state collaboratives to submission or the delays of arbitration.

The schedule is as grossly unfair to CLECs as it is unrealistic. In Phase I, Joint Applicants are given five months to develop a proposal for deploying application-to-application OSS interfaces. It is unclear why Joint Applicants need five months since they have already begun meetings regarding those interfaces. At the FCC they have committed "no later than merger closing" to provide the FCC an OSS Process Improvement Plan identifying "the OSS changes that are needed to implement SBC/Ameritech's OSS commitments." (FCC Conditions, ¶ 8.) In fact, in Ohio Joint Applicants have committed to develop and present all post-merger OSS changes within 60 days of the merger closing. (Ohio Stipulation and Recommendation, Section IV.A.3.) Since Joint Applicants have committed to implementing "uniform" interfaces and business rules throughout their 13-state region, it is safe to assume that the plans they share in Ohio in two months will be substantially similar to the plans they will share with the FCC and Illinois within 5 months of the merger closing.

CLECs, on the other hand, are allowed only 2 months in the Illinois Phase II to review all the details of Joint Applicants proposals in regard to: (1) changes in OSS interfaces (2) business rules regarding those interfaces (3) a change management process regarding those interfaces and (4) the schedule for deployment of those interfaces and business rules. Two months is far too short for meaningful CLEC analysis of Joint Applicants's proposed plans, much less for CLECs and Joint Applicants to discuss potential solutions to open issues that might arise in those collaboratives. In fact, the Illinois CLECs have engaged in negotiations pertaining to the implementation of EDI

version 7.0 for more than a year with Ameritech, and have been discussing the implementation of EDI 10.0 since November of 1998. Joint Applicants admit that "[t]he collaborative process in Texas lasted approximately nine months." (SBC/Ameritech Ex. 10.0, p. 6.) In California, the collaborative process took approximately seven months to come to a conclusion. (Tr. 2178-79.) And neither of those collaboratives concerned wholesale changes in the underlying BOC's OSS interfaces and business rules.

The consequence of not accepting Joint Applicants's proposed plan in full within two months, on the other hand, is a delay in the deployment of OSS interfaces and business rules through an arbitration process which is unbounded in duration. The indefinite nature of this process could easily extend for many months or even (with possible appeals) years – well past the 3-year sunset date on which the FCC conditions cease to be effective and binding on Joint Applicants.

What is clear, however, is that based on their Illinois and FCC commitments, Joint Applicants can unilaterally force the process to arbitration and then refuse to do any work on the development or deployment of OSS interfaces until they have received the arbitrator's decision on all matters in dispute. Thus, even if the CLECs and Joint Applicants were to come to agreement on some, but not all, OSS issues, Joint Applicants could refuse to implement even those OSS enhancements/changes until the arbitration was complete. Taken together, the facts demonstrate that this shotgun collaborative will give CLECs little ability to stop SBC from taking a "take it or arbitrate it" stance in those FCC and Illinois collaboratives.

But beyond their vague and misleading nature, Joint Applicants's "promises" in relation to OSS have become downright incomprehensible based on the substantially

similar "promises" Joint Applicants have also made at the FCC concerning OSS deployment. While Joint Applicants readily agree that their Illinois OSS commitments are subsumed within the FCC OSS commitment to implement "uniform" interfaces and business rules (Tr. 2172), and that the FCC and Illinois OSS collaboratives will address identical issues during similar timeframes, Joint Applicants offer no explanation regarding how these two commitments, or how these overlapping collaboratives, would possibly function.

Most fundamentally, Joint Applicants fail to explain what would happen if the FCC collaborative and the Illinois collaborative – or, more likely, the arbitration decisions resulting therefrom – result in differing conclusions. For example, what happens if the FCC and Illinois collaboratives come to differing results regarding OSS improvements, business rules, or a change management process? If the FCC collaborative is already in arbitration when the Illinois two-month collaborative comes to a voluntary agreement, does a later differing FCC arbitration ruling negate the voluntary Illinois agreement? How can Joint Applicants comply with their commitment to implement uniform interfaces and business rules throughout their 13-state region, while at the same they are pursuing separate agreements in Illinois regarding OSS enhancements and interfaces? While Joint Applicants admit that there is a "potential" for inconsistent results, Joint Applicants offer vague and unenforceable suggestions of a "coming together" of regulatory entities to "agree on some sort of single adhesive process, rather than manage these processes independent of one another." (Tr. 2184-85.) Joint Applicants fail to explain how this unprecedented convergence would take place. These are the very kinds of questions the

Commission posed in its July 9th

proposal put forth in Illinois"), yet Joint Applicants have failed to provide a response.

In fact, the FCC and the ICC are not the only entities that affect Joint Applicants's

commitments in Ohio. While at the FCC and in Illinois Joint Applicants have committed to deploying OSS interfaces in 24 months, with a collaborative beginning five months after

from the merger within six months of the merger closing, with a collaborative beginning 2 months after the merger closes. (Ohio Stipulation and Recommendation, Section IV.A.3.)

same time it is first sitting down in the FCC and Illinois collaboratives to discuss deploying "uniform" application-to-application interfaces and business rules. And there is no specific

implement OSS changes. Therefore, it is likely that whatever OSS changes Joint Applicants begin to implement in Ohio will become SBC/Ameritech's "take it or arbitrate

litany, it is likely that Joint Applicants will attempt to force Illinois CLECs to accept the results of the preceding Ohio and/or FCC collaboratives.

or around the same time: (1) Three collaboratives at the FCC dealing with "uniform" interfaces, business rules, and access to xDSL systems; (2) Three collaboratives in Illinois,

and liquidated damages; and a third with interconnection; (3) Two collaboratives in Ohio,

one dealing with OSS interface changes and the other dealing with performance measures and remedies. Since all these collaboratives take place concurrently and deal with the same issues, it would be difficult enough for entities the size of AT&T, MCI and Sprint to be able to staff and juggle them effectively; certainly smaller Illinois CLECs will have even less ability to do so. And the state commissions and FCC have similar staffing and financial constraints. These overlapping collaboratives raise the likelihood of a "collaborative train wreck" which would make an open-ended arbitration all the more likely.

In short, Joint Applicants' all-purpose answer to OSS issues is to place them in collaborative processes, but it is clear that that is simply a device to avoid having to commit to any substantive plan for OSS harmonization and improvement in the process of getting this merger approved. And given the overall three-year time frame in which OSS "commitments" will be in effect, there is a strong potential that they will never come about in the first instance. If the Commission looks behind all the paper promises of future proposals and processes, it will find no OSS improvements are specified at all, much less improvements that are enforceable or that a CLEC could use to develop a business plan for market entry.

11. The manner, necessary actions and timetable by which the Joint Applicants would incorporate incident-based, liquidated damages provisions into interconnection agreements in Illinois.

13. The manner, necessary actions and timetable by which the Joint Applicants would create detailed performance monitoring reports to compare the provision of the following services to CLECs with internal performance standards: network performance, Operations Support Systems (OSS) and customer (i.e. CLEC) service.

In response to these questions, Joint Applicants have promised, within 300 days of merger closing, to make available in Illinois 79 of the 122 agreed to Texas performance measures and benchmarks. (SBC/Ameritech Ex. 10.0, p. 7.) Joint Applicants could not list the 79 measures/benchmarks that they intend to implement in Illinois, except to say that 36 of those 79 will include the measures/benchmarks agreed to at the FCC. In addition, Joint Applicants agreed to enter into a collaborative, to begin within 90 days of merger closing, to discuss which of the remaining 122 Texas measurements/benchmarks to implement in Illinois. (SBC/Ameritech Ex. 10.0, pp. 3-7.) If a dispute arose in that collaborative, Joint Applicants proposed that the dispute be handled by arbitration. Assuming no dispute arose, Joint Applicants promised to implement, within 210 days of merger closing, those standards/benchmarks that were agreed to in the collaborative and which Joint Applicants believe are "technically and economically feasible" to implement in Illinois. (SBC/Ameritech Ex. 10.0, p. 6.) Joint Applicants failed to state which of the 122 Texas measurements/benchmarks, if any, they believe are technically and economically feasible in Illinois.

Finally, Joint Applicants promised to make available to Illinois CLECs the Texas liquidated damage plan concerning those standards/benchmarks that are adopted in Illinois, except that the state-wide annual cap would be reduced from $120 million in Texas to $90 million in Illinois.[110] (SBC/Ameritech Ex. 10.1 (the Texas liquidated

[110] At the FCC Joint Applicants have committed to a less stringent federal performance parity plan. There, Joint Applicants have committed to implementing 36 of the Texas performance measures and have also committed to a revised liquidated damage plan in regard to those measures. That FCC plan would cap Illinois liquidated damages paid to CLECs at $8.11 million in year one and $20 million in year three. The federal performance parity plan begins nine months after merger closing and concludes after three years. Obviously, those federal commitments are narrower than the commitments Joint Applicants have made in Illinois. Since Joint Applicants have indicated that

damages plan is attached to SBC/Ameritech Ex. 10.0 as Attachment 2).) Joint Applicants did not indicate when this plan would be made available to Illinois CLECs. Joint Applicants also pledged to discuss this plan in the Illinois performance measure collaborative with any disputes being resolved by an open-ended arbitration. Under Joint Applicants's proposal, the performance measures/benchmarks and liquidated damages plan would be provided to Illinois CLECs via an amendment to those CLECs' interconnection agreements with Ameritech Illinois.

Like the OSS commitments, Joint Applicants's commitments in this regard are entirely vague. First and foremost, Joint Applicants failed to list 43 of the 79 performance measures and benchmarks they will implement in Illinois within 300 days. Joint Applicants's ambiguity in this regard is suspect since Joint Applicants's testimony discusses at length the criteria they used for choosing the specific number 79: "The number of measurements was determined based on a determination by SBC/Ameritech as to those measurements that could be implemented in an expedited manner. These measurements are those that directly impact the end-user customer and include the majority of those measurements recommended by the DOJ." (SBC/Ameritech Ex. 10.0, p. 7.)

Thus, while Joint Applicants can describe the 79 measurements with such particularity, even going so far as to claim they will include the "majority" of

---

they would not implement both plans in Illinois (SBC/Ameritech Ex. 10.0, pp. 2-3 ("Due to the potential inconsistencies or the problems created by differing processes, Joint Applicant could not agree to follow both the Texas based and FCC based mechanisms/process, etc. in Illinois"); Tr. 2287-88), AT&T has focused its comments on the broader Illinois commitments. AT&T's criticisms of the FCC performance parity plan are included in AT&T's Comments to FCC regarding the Proposed FCC Conditions (Attachment A hereto).

measurements recommended by the DOJ, on cross-examination Joint Applicants repeatedly claimed they could not name them, other than to say that 36 of the 79

2278-80.) In regard to the identify of the remaining 43 measurements/benchmarks, Joint Applicants are silent. Again, Joint Applicants have carefully couched their "commitment"

it actually is. And again, Joint Applicants have given themselves plausible deniability in regard what they have, or have not, committed to in Illinois.

implement any performance measures/benchmarks beyond the 79. Joint Applicants have specifically committed to implementing ___ those Texas measures/benchmarks (beyond the 79) that SBC/Ameritech believe are "technically and economically" feasible in Illinois.

failed to conduct any analysis regarding which of the 122 Texas measurements/benchmarks are technically and economically feasible in Illinois. (Tr. 2313-

with a disputing CLEC's only remedy open-ended arbitration. (Tr. 2315-16). In reality, therefore, Joint Applicants have not committed to implementing even one of the Texas

In fact, the existence of a federal performance parity plan that only requires implementation of 36 of the 122 Texas measurements/benchmarks raises the possibility

in terms of "technical or economic" infeasibility) for not implementing additional

measurements/benchmarks in Illinois beyond the 79. Indeed, Joint Applicants have already begun to apply that pressure on other states. Ameritech Michigan has asked the Michigan Public Service Commission (MPSC) to reconsider its order requiring performance measurements and to defer application of any requirements that "conflict with the performance measurements adopted, or to be adopted," in this proceeding based on its representation that the MPSC's measurements would require Ameritech "to devote significant resources to implementing processes that would not survive FCC action."[111] Ameritech's excuse for noncompliance in Michigan sounds dangerously similar to an argument that the existence of the FCC plans makes implementation of the Michigan plan economically infeasible. Ameritech has also filed a pleading seeking leave to withdraw from the Indiana Commission's investigation into OSS measures, similarly claiming that the existence of the FCC performance measures would bring on "unnecessary" duplication of efforts.[112] Ameritech's filing, coupled with Joint Applicants's well-caveatted commitments, raise the likelihood that Joint Applicants will attempt to misuse the FCC conditions to substantiate a claim that it is "technically or economically" infeasible to implement any standard/benchmarks beyond the 79 in Illinois.

Joint Applicants have also failed to give any indication concerning how long they will make these performance measures/benchmarks and liquidated damages available to Illinois CLECs. While SBC witness Mr. Dysart indicated that CLECs could, post-merger, incorporate the terms of those measures/benchmarks and the Texas liquidated damages

[111] Ameritech Michigan's Petition for Rehearing or Clarification, MPSC Case No. U-11654, U-11830, at 5-6 (Mich. PSC June 28, 1999).

[112] Ameritech Indiana's Motion to Withdraw from Proceeding, IURC Cause No. 41324 (July 26, 1999).

pressed regarding how long Joint Applicants would offer those terms in their interconnection agreements with Illinois CLECs. On cross-examination, Mr. Dysart

that "a lot of things could happen." (Tr. 2278, 2308-2309.) Thus, he indicated that if a CLEC wished to keep those terms and conditions in future interconnection agreements,

2308-09.) This is especially troublesome since performance measures/benchmarks with automatic liquidated damages will become all the more important if Joint Applicants

Other than their vagueness, Joint Applicants's commitments regarding performance measures and liquidated damages are otherwise flawed. Included in

addressed. In fact, the enormity of these flaws raise the likelihood that the collaboratives will result in protracted arbitration.

committed to making available the 36 performance measures/benchmarks that they have agreed to make available at the FCC. The Commission still does not know what other 43

because of Joint Applicants's caveat of "technical or economic" feasibility, Commission has no assurance that Joint Applicants will provide more than 79 of those 122 Texas

the Texas liquidated damages plan available in Illinois, they have failed to indicate how

long Illinois CLECs could take advantage of this offer. And, as noted, that plan has numerous flaws that would have to be fixed in the collaborative process. In short, Joint Applicants's paper promises in regard to performance measures and liquidated damages are, once again, couched with caveats, ambiguities and shortcomings that make Joint Applicants's purported "promises" nothing more than a promise of future arbitration to the detriment of Illinois consumers.

9. National Local Subsidiary

A clear explanation of the National Local Subsidiary, as used in this docket, and the impact that this subsidiary would have on retail rates. . . . Explain if the National Local Subsidiary would provide local service for its customers in Illinois. Explain whether the National Local Subsidiary would be certified as a CLEC in Illinois. Explain whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with AI.

The National Local Subsidiary and its relationship to Ameritech in Illinois raise basic competitive issues in this proceeding. The fundamental intent of the Telecommunications Act is to require that incumbent local exchange carriers such as Ameritech-Illinois provide other competitive carriers the opportunity to use the exchange network on an arm's length, nondiscriminatory basis so that the advantage of the incumbent's inherited network and market position can be eroded over time. This *goal* of nondiscrimination stands in stark contrast to the very *intent* of the proposed merger, in that one of the stated reasons for the merger is to position SBC to compete for the "national local business" customer by offering a package of services across a number of states. Obviously, although some locations will be in areas where NatLoCo will be operating as an entrant unaffiliated with the incumbent LEC, other locations – in

particular, Ameritech's franchise territory in Illinois – will be where an SBC affiliate is already the incumbent local carrier.

Fundamental questions are thus presented, including: What will be the relationship between Ameritech-Illinois (SBC's ILEC) and NatLoCo (SBC's "CLEC")? Does Ameritech-Illinois intend to treat NatLoCo like any other CLEC? Or, will Ameritech-Illinois discriminate in favor NatLoCo, thereby enabling SBC to bundle monopoly (i.e., within franchise) services with competitive (i.e., beyond franchise) services into a single package that only *another* massive ILEC can match? In the previous round of hearings in this case, Joint Applicants totally failed to explain the relationship between NatLoCo and Ameritech Illinois or to address the competitive concerns that relationship presents. Consequently, the Commission requested additional information during the reopening phase. Specifically, among other issues, the Commission requested that the Joint Applicants:

* Explain if the National Local Subsidiary would provide local service for its customers in Illinois.

And,

* Explain whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with Ameritech-Illinois.

On reopening, Joint Applicants have revealed slightly more about the relationship between NatLoCo and Ameritech Illinois as they envision it. The information they have provided is scant, however, and it raises further questions and issues that should concern the Commission. Certainly, Joint Applicants offer no assurances, much less commitments, which ameliorate the anticompetitive concerns presented by their NatLoCo plans.

It is now apparent that the Joint Applicants envision an arrangement whereby Ameritech-Illinois would offer and provide local service in Illinois, while NatLoCo would have some role in "coordinating" the services of SBC's ILEC affiliates to give the impression of a single provider.[113] It appears, in other words, that Ameritech-Illinois would become the Illinois arm of SBC's National Local Strategy. Consequently, although NatLoCo would not have any formal legal standing in Illinois,[114] it would nevertheless in effect be competing in Illinois through the efforts of Ameritech Illinois.

Joint Applicants now indicate that, in fact, they have no intention to treat NatLoCo like any other CLEC. Their most recent explanation is that NatLoCo will not operate as a CLEC in Illinois *at all* (and, therefore, it will not have to overcome the barriers that Ameritech throws in the way of legitimate entrants trying to buy network elements and/or interconnection as arm's length competitors). Instead, NatLoCo will work "cooperatively" with Ameritech-Illinois in some vague and undisclosed manner. And *when pressed,* Joint Applicants concede that services/facilities provided by Ameritech-Illinois to NatLoCo would not be available to other CLECs in *any* manner.

This, then, is SBC-Ameritech's "response" to the question posed by the Commission as to how Ameritech-Illinois will provide service to NatLoCo, and whether it will it treat all CLECs the same. This question, as noted previously, is critical and was clearly stated in the Commission's specific request to the Joint Applicants. Yet the Joint Applicants' response continues to deflect the question rather than defend – or even fully

---

113 *See* Gillan DOR (AT&T Ex. 1.2) at 23.

114 SBC has stated that it will not file for a local exchange certificate for its NatLoCo subsidiary in Illinois until January 1, 2003.

[115]

between Ameritech Illinois and NatLoCo, SBC sees no obligation to extend similar – much less nondiscriminatory – treatment to other competitors.

services/facilities/marketing to NatLoCo that it will not make available to other CLECs, there is the issue as to what NatLoCo will Ameritech-Illinois for these services/functions (that only it can obtain). With respect to this concern, the Joint

transaction and cost allocation rules.[116]

assets between regulated and unregulated affiliates, and we do not understand Joint Applicants to be saying that assets will be transferred from Ameritech Illinois to

[117] Cost allocation rules are only meaningful if one (or both) of the affiliates are

which is not the case here because Ameritech-Illinois is subject to price-cap regulation under its Alt Reg plan. There is no reason to expect that form of cost-allocation can

---

[115]

reiterated that the Ameritech national accounts sales force will market to in-region large customers (Sears, for example, in Chicago) and that if they are successful, they will be the provider of

however, SBC denied that even its *own*
NatLoCo could be relied upon; asked if Mr. Kahan's testimony means that, for national customers headquartered in Illinois, Ameritech Illinois will be the marketing contact for the "national local"

"[a] final determination as to the marketing contacts within Illinois for national customers has not yet been determined." SBC Ameritech Response to AT&T Data Request 1-20(c).

See SBC-Ameritech Ex. 1.3, Kahan DOR, p. 21.

[117]

Illinois. Id.

prevent competitors from being disadvantaged by NatLoCo's special relationship with Ameritech Illinois. In all events, Joint Applicants have not begun to clarify the nature of this relationship or explain why it would not disadvantage non-affiliate competitors.

In short, Joint Applicants never directly answer the Commission's question. Instead, the "answer" emerges only grudgingly, through inference drawn from cryptic discovery responses: Ameritech-Illinois *will not* treat NatLoCo like other CLECs.[118] SBC's attempts to soften the impact of this answer with vague references to "cost allocation and affiliate transaction rules" is unavailing, because none of the cited rules would ensure that Ameritech-Illinois would treat NatLoCo like any other CLEC or otherwise give any assurance that CLECs would not be disadvantaged unfairly by the combined SBC/Ameritech.

As the Commission's question on reopening implies, it is crucial that other CLECs have an opportunity to compete on a level playing field. A NatLoCo should not be allowed to create national local packages in "cooperative partnership" with its ILEC affiliates. Like any other CLEC, a NatLoCo should be required to overcome the same entry barriers (such as primitive OSS and efforts to limit the availability of UNEs) that its ILEC affiliates impose on every other market participant.

First, a NatLoCo should be prohibited from including, in any national bundle, any service offered by Ameritech-Illinois. Any attempt to prevent discrimination while still allowing NatLoCo to leverage the Ameritech-Illinois incumbent market position would be

---

[118] Although SBC-Ameritech's testimony *proved* that the answer to the question was no, perhaps *because* the answer was no, the Joint Applicants never answered this question from the Commission directly.

futile. The only way that Ameritech-Illinois could treat NatLoCo like other CLECs would be if NatLoCo offered services in Illinois as a separate entity, and subject to rules which recognize the *unique* problems that arise when a CLEC is a wholly-owned affiliate of an ILEC. The key problem stems from a single, undisputed fact that must be recognized in every Commission policy that addresses Ameritech-Illinois' relationship to NatLoCo: Because these companies have the same stockholder, the *price* that NatLoCo pays to Ameritech-Illinois for services/facilities is *irrelevant* to its economic behavior. All that matters is the *cost* that Ameritech-Illinois incurs. As Mr. Gillan explained, this means that the most important condition that can govern Ameritech-Illinois' relationship to NatLoCo is that NatLoCo be permitted to buy from Ameritech-Illinois *only* those services/facilities that are: (1) available to any other CLEC, and (2) are priced at rates based on economic cost.

Because NatLoCo and Ameritech-Illinois would be owned by the same entity, the price that NatLoCo pays Ameritech-Illinois is nothing more than shifting dollars from one subsidiary to another. NatLoCo's "cost" for services/facilities purchased from Ameritech-Illinois becomes Ameritech-Illinois' revenues. When costs/revenues are consolidated to determine SBC's earnings, the transaction "nets out" with no effect on corporate profits. The principal implication is that whatever service/facility that Ameritech-Illinois were to provide to NatLoCo would have to be priced at its forward-looking economic cost and be available to other CLECs on identical terms and conditions (including ordering and provisioning using the same OSS).

Finally, NatLoCo would have to be prohibited from simply "reselling" Ameritech-Illinois' services because service-resale is *inherently* discriminatory and favors an affiliate

of an ILEC such as NatLoCo. Service-resale by an ILEC's affiliate uniquely advantages the affiliate and is inherently discriminatory. A wholly-owned affiliate like NatLoCo is able to use resale within the franchise of its affiliated ILEC because none of the financial and market constraints that would affect a legitimate entrant apply. For instance, under service resale, Ameritech-Illinois would continue to receive access revenues for each of NatLoCo's customers; in effect, NatLoCo would be nothing more than an uncompensated marketing agent for Ameritech-Illinois' access service. While this relationship would be acceptable to NatLoCo, no independent CLEC could succeed in such a role.[119]

The point, ultimately, is that competition will be harmed if SBC is allowed to bundle monopoly and competitive services across a vast post-merger footprint – a footprint that no other carrier can come close to replicating. Whether the harm is achieved by *bundling* NatLoCo's services with those of Ameritech-Illinois – or by NatLoCo *reselling* the same Ameritech-Illinois service – the result would be a crowding out of legitimate competitors that have no base of incumbent customers to leverage. This, in short, is a palpable danger posed by this proposed merger, and the answer given by Joint Applicants to the Commission's question is both inadequate and unacceptable.

ENFORCEMENT

11. The manner, necessary actions and timetable by which the Joint Applicants would incorporate incident-based, liquidated damages provisions into interconnection agreements in Illinois;

---

[119] Furthermore, the defining constraint of resale is that the CLEC-reseller can only offer services that are identical to those of the incumbent. This limitation, however, could actually work to NatLoCo's advantage: Far from being concerned with an inability to establish a unique product, NatLoCo would *want* customers to perceive it as the incumbent – the *goal* would be to trade Ameritech-Illinois' monopoly legacy and reputation. As Mr. Gillan testified, because of the inherent limitations of service resale, virtually every major carrier that has tried to compete using service resale -- at least, every *unaffiliated* carrier -- has terminated its resale activity.

12. Reasonable and effective enforcement mechanisms for any condition imposed, including appropriate penalties, economic or otherwise;

The issues are discussed in the preceding sections.

III. Other Proposed FCC Conditions

Because of the timing of the filing of the Proposed FCC Conditions, AT&T has not had a full opportunity to examine and test the FCC proposals. However, even without discovery or testimony, the infirmities in the Carrier-to-Carrier Promotions – Loop Discount[120], Resale Discount[121] and UNE-P Offering[122] – are self-evident. The restrictions on the availability of the UNE-P and discounts on loops and resale services violate the Act's nondiscrimination provisions, as well as clear FCC rules and orders interpreting those provisions.[123] Section 251(c)(3) of the Act requires ILECs to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . ." 47 U.S.C. § 251(c)(3) (emphasis added). Section 251(c)(4) requires ILECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail . . . and . . . not to impose unreasonable or discriminatory conditions or limitations on, the resale of such

[120] FCC Proposed Conditions ¶ 46.

[121] FCC Proposed Conditions ¶ 47.

[122] FCC Proposed Conditions ¶ 48.

[123] Additionally, and importantly, these features of the Proposed FCC Conditions are inconsistent with this Commission's pricing and platform policies as articulated, e.g., in the Customers' First proceeding, ICC Docket No. 94-0096 (consol.) (Order, April 7, 1995), at 38-40(loop pricing) and

telecommunications service . . ." 47 U.S.C. § 251(c)(4). Section 252(i) provides that an ILEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

Yet, the SBC/Ameritech Proposed Merger Conditions purport to permit, and even require, discrimination among carriers and customers. For example, combinations of network elements would be available to serve some residential customers, but not others because of an artificial cap. (FCC Conditions, ¶ 49.) Combinations of network elements would be available to serve some residential customers, but not business customers. (FCC Conditions, ¶ 48.) The price of unbundled loops used to serve some residential customers would be higher than the price of unbundled loops used to serve other residential customers because of the cap on the unbundled loop discount and the unavailability of the discount to customers served through the UNE-P. (FCC Conditions, ¶ 46(e) & (g).) Because the loop discount is only available to residential customers, the price of unbundled loops used to serve business customers would be higher than the price of unbundled loops used to serve some residential customers. Because the discount does not apply to loops used to provide advanced services, the price of unbundled loops used to provide advanced services would be higher than the price of those same unbundled loops when used to provide traditional voice services. (FCC Conditions ¶ 46(e).)

---

the Wholesale Proceeding, ICC Docket No. 95-0458/95-0531 (Order, June 26, 1996)(no restrictions on the local switch platform).

In fact, the FCC has authoritatively interpreted the Act's nondiscrimination provisions to prohibit just these types of price discrimination:

- The FCC conditions vary the rates carriers must pay for unbundled loops based on the class of customers served by the requesting carrier (business versus residential) and the types of services offered by that carrier (e.g. advanced services versus basis voice). This variation is directly contrary to the plain terms of FCC Rule 51.303(c), which provides that the "rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the types of services that the requesting carrier purchasing such elements uses them to provide." 47 C.F.R. § 51.303(c).

- The Proposed Stipulation varies the rates a carrier pays for unbundled loops and wholesale services based on non-cost based factors including the class of customers served (residential versus business), the technology used (UNE switching or its own), and the type of entry chosen (UNE combinations or facilities) by the requesting carrier. Yet in its First Report and Order, the FCC held that "price differences not based on cost differences but on such other considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs, the requirements of the Act, or applicable rules, would be discriminatory and not permissible under the new [nondiscrimination] standard." First Report and Order ¶ 861.

- The caps on the number of discounted loop, resale, and platform offerings that will be made available to competitive LECs squarely violate both the "pick and choose" rule of Section 252(i) of the Act and 47 C.F.R. § 51.809(a) (which implements Section 252(i)). Those provisions require incumbent LECs to "make available any . . . service, or network element" provided under an approved interconnection agreement with one competitive LEC to any other competitive LEC that requests it and to do so "upon the same terms and conditions." *See* 47 U.S.C. § 252(i). Under the caps, however, competitive LECs would not be able to obtain the arrangements given to other competitive LECs "upon the same terms and conditions" once the caps had been reached. And the same reasons render the caps unlawful under Section 251(c)(3), which requires incumbent LECs to provide "nondiscriminatory access" to network elements to "any" requesting carrier; under 47 C.F.R. § 51.313(a), which requires that "[t]he terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers"; under Section 251(c)(4)(b), which prohibits "discriminatory conditions" on resale; and under 47 C.F.R. § 51.603(a), which likewise requires that resale be "nondiscriminatory."

It is not surprising that SBC and Ameritech seek the right to discriminate. Such a capability enables them to place limits on entry, and to skew their offerings in those

directions that pose the least competitive threat to their monopolies – as they have here. The discriminatory loop discounts and the other provisions distort the market to create incentives for the more implausible and less threatening entry strategies (and entrants).

For example, the 25% loop discount is geographically averaged across the entire SBC/Ameritech region. (FCC Proposed Conditions ¶ 46 (d).) That means that the loop discount in Illinois will not necessarily be 25%. In fact, because Illinois has relatively low loop rates, the Illinois discount most likely will be under 25%. Thus, SBC and Ameritech have expressly reserved the right to establish higher discounts in areas with less competition and fewer competitors (e.g., Arkansas), while establishing lower (or zero) discounts in more competitive areas (e.g., Chicago). Tr. at 1899 (Kahan). Furthermore, Joint Applicants can offer higher discounts in rural Illinois as opposed to Chicago. Tr. at 1899-90 (Kahan). At first glance, it may appear that the discounts will incent competition in less competitive areas, because the discounts are higher there. However, the Commission must keep in mind that to get the loop discount, CLECs must use their own switches. The discount cannot be used in conjunction with switching purchased from SBC/Ameritech. Proposed FCC Conditions § 46(e). Switches cost millions of dollars and it can take carriers anywhere from nine months to two years to purchase and install a switch. FCC First Report & Order ¶ 411 (*citing* Illinois Staff testimony in ICC Docket No. 95-0458 (Wholesale Case). Now SBC/Ameritech's strategy becomes clear – "incent" competition in areas where CLECs have no switches, are not likely to put switches, and, even if they tried to take advantage of the loop discount, would miss out on half the discount period during the switch purchasing and installation phase. The discount stratagem is clearly and carefully designed to minimize market-opening effects.

Adoption of these conditions would represent a radical, unexplained, and wholly unwarranted departure from foundational regulatory principles under the Act: to provide competing carriers the right to choose the form of entry that makes sense to them (e.g. resale, UNE combinations, facilities), and the right to compete against each other on equal footing no matter the entry form chosen.

CONCLUSION

For the foregoing reasons, the Commission should reject the Joint Application for merger approval.

REQUEST FOR ORAL ARGUMENT

AT&T requests oral argument before the Commission pursuant to Section 200.850 of the Commission Rules of Practice.

Dated: July 28, 1999

AT&T COMMUNICATIONS OF ILLINOIS, INC.

By:_____

William A. Davis, II
John F. Dunn
Clark M. Stalker
David C. Chorzempa
AT&T Law Department
222 West Adams Street
Suite 1500
Chicago, Illinois 60606-5307
(312) 230-2637